LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 526

BLANCO OIL CO. and KILLAM & HURD, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE B. MICKUM, III
JAMES L. McHUGH, JR.
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Blanco Oil Co. and Killam & Hurd

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Of Counsel

August 22, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	3
Statement	5
Reasons for granting writ	8
Conclusion	12

CITATIONS

CASES:

Atlantic Refining Co. v. *Public Serv. Comm'n* (*CATCO*), 360 U.S. 378 (1959) 6, 10
FPC v. *Hope Natural Gas Co.* 320 U.S. 591 (1944) .. 10
Humble Oil & Refining Co., 32 F.P.C. 49 (1964) 11
Montana-Dakota Utilities Co. v. *Northwestern Public Serv. Comm'n*, 341 U.S. 246 (1951) 10
Pan American Petroleum Corp. v. *FPC*, 376 F.2d 161 (10th Cir. 1967) 9
Public Serv. Comm'n v. *FPC*, 329 F.2d 242 (D.C. Cir. 1964), certiorari denied *sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963 (1964) 9
Skelly Oil Co., 35 F.P.C. 849 (1966) 11
Standard Oil Co. of Texas v. *FPC*, 376 F.2d 578 (10th Cir. 1967) 9
Sunray DX Oil Co. v. *FPC*, 370 F.2d 181 (10th Cir. 1966) 9
Sunray Mid-Continent Oil Co. v. *FPC*, 270 F.2d 404 (10th Cir. 1959) 6, 9
T.I.M.E., Inc. v. *United States*, 359 U.S. 464 (1959) .. 10
United Gas Improvement Co. v. *Callery Properties, Inc.* (*Callery*) 382 U.S. 223 (1965) 10

STATUTE: Page

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w:
Section 7(c), 15 U.S.C. 717f(c) 2
Section 7(e), 15 U.S.C. 717f(e) 3

MISCELLANEOUS:

Statement of General Policy No. 61-1, issued September 28, 1960; 24 F.P.C. 818 5

United States Bureau of Mines, *1965 Minerals Yearbook* 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

BLANCO OIL CO. and KILLAM & HURD, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Blanco Oil Co., a corporation, and Killam & Hurd, a partnership, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered on May 24, 1967.

OPINIONS BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals is not yet reported but is printed as Appendix "A" of the petition for certiorari in this same case filed by Austral Oil Company Incorporated, No.

504, October Term 1967. Opinion No. 478 of the Federal Power Commission, issued September 30, 1965, is printed in Volume I of the Joint Appendix ("J.A."), nine copies of which are filed with the Austral petition, at pages 436-463. The Presiding Examiner's Initial Decision, issued June 22, 1965, is printed at J.A. 349-432.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. 717f(c)

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary cer-

tificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. 717f(e)

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale, * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Natural Gas Act gives the Federal Power Commission the authority to issue temporary certificates of public convenience and necessity to producers of natural gas pending disposition of their applications for permanent certification. Although these temporary certifications are issued on an *ex parte* basis, affected persons have a right to seek review. Further, under the Natural Gas Act the Commission has the authority to subject the issuance of temporary certificates to "such reasonable terms and conditions as the public convenience and necessity may require." It is clearly

established that in the exercise of this conditioning power, the Commission can (1) require a producer to reduce its negotiated contract price to a level deemed by the Commission low enough to hold the price line, (2) require an agreement not to seek any rate increase while the temporary certificate is in force, and (3) require an agreement to refund amounts collected in excess of a specific price if the price permanently certified is lower than the price authorized by the temporary certificate. Invariably, whenever it employs its conditioning power in any of the foregoing respects, the Commission requires the producer to accept the conditioned temporary in writing before commencing service, thus creating in effect a contractual relationship between the producer and the Commission.

In this case the Commission issued a temporary certificate to the Petitioners conditioned upon a reduction of their contract price to a lower price, thus holding the price in line with other certificated prices at the time, and stipulated that no higher price could be charged during the period of temporary service. It also required acceptance of the certificate in writing. No condition was imposed requiring refunds if the permanent certificate was issued at a price lower than that contained in the temporary certificate and there was no notice of any kind that refunds might be required. Petitioners' acceptance of the temporary certificate was in accordance with the general understanding at the time, *viz.* that they were "without any obligation to refund"; and their acceptance was approved and filed as part of their rate schedules.

Considering the existence of the foregoing powers and the Commission's actions, the question is whether

the Commission has the authority to order refunds of amounts collected in excess of the permanently certificated price.[1]

STATEMENT

Petitioners, Blanco Oil Co. and Killam & Hurd, are independent producers of natural gas. On October 20, 1960, they applied to the Federal Power Commission for authorization under Section 7 of the Natural Gas Act to sell natural gas in the interstate market from their wells in the Northeast Thompsonville Field in Texas Railroad District No. 4. These sales were pursuant to contracts which provided for an initial price of 20.045 cents per Mcf to be paid by the pipe line company.

Petitioners also requested temporary authority to commence sales at the contract price. This was less than one month after the Commission had issued Statement of General Policy No. 61-1[2] which established 18 cents per Mcf as the guideline price for Texas Railroad District No. 4. This Statement, *inter alia,* was

---

[1] While the court of appeals ruled on the power of the Commission to order refunds in appropriate cases, it did not decide whether it would be proper for the Commission actually to order refunds on the facts and circumstances presented by petitioners' case. In light of the fact that the Commission has attempted to raise the question of propriety in its petition for certiorari in No. 80, October Term 1967, petitioners reserve the right also to argue this question if certiorari is granted. Petitioners contend that a refund order would be a denial of their rights under the Fifth Amendment to the Constitution of the United States under all the facts. In the event any aspect of the in-line price determination made by the Commission is presented to the Court by any party, petitioners also reserve the right to contest the validity of such determination as to them.

[2] Statement of General Policy No. 61-1, issued September 28, 1960; 24 F.P.C. 818.

intended to implement this Court's mandate in *CATCO*[3] "to hold the line" on natural gas prices.

Consequently, the Commission rejected Petitioners' efforts[4] to collect the contract price during the period of temporary service. It conditioned the temporary certificate by reducing the contract price to the guideline 18-cent price, requiring that no higher price be collected during the period of temporary service and requiring the written acceptance of the temporary certificate by the Petitioners (J.A. 216-220). Although conditions requiring an agreement to refund were utilized by the Commission at the time, no such condition was included in the temporary certificate offered to the Petitioners. Reflecting their understanding of the Commission's intentions and of law (*Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (10th Cir. 1959)), Petitioners' acceptances of the temporary certificates offered by the Commission by letters of January 16, 1961, specifically state that they were "without any obligation to refund" (J.A. 232-237). These letters were approved by the Commission on January 18, 1961, and designated as supplements to Petitioners' rate schedules.

On September 30, 1965, after extensive proceedings and after a delay of almost five years, the Commission issued its final decision on the applications for per-

---

[3] *Atlantic Refining Co.* v. *Public Serv. Comm'n* (*CATCO*), 360 U.S. 378 (1959).

[4] Prior to accepting the temporary certificate, as offered by the Commission, the Petitioners twice sought to collect the contract price subject to refund down to the 18 cent guideline price. Subsequently, Petitioners twice filed rate increases up to the initial contract price which were rejected by the Commission because, it said, the temporary certificate required that no higher price than 18 cents could be collected during the period of temporary service.

manent certificates, granting them on the condition that Petitioners charge no more than 15 cents per Mcf (Opinion No. 478, J.A. 436-463). It was at this time that the Commission in this proceeding first raised the question of whether refunds should be ordered as a condition to the issuance of permanent certificates; however, this question was deferred for subsequent consideration. Paragraph (K) of the Commission's Opinion requested the parties to file briefs on the refund question and to outline the type of evidence which they would wish to place in the record bearing on the refund issue (J.A. 458-59).

Petitioners filed a brief in compliance with this request urging that the Commission lacked the power to order refunds and that for several reasons refunds would be inequitable as to them. For example, Petitioners pointed out that Atlantic Refining Company, which is the largest producer in the same field, and which had sold gas under an identical temporary certificate issued at the same time, had received permanent certification for sale under a contract identical with Petitioners, and, in one instance, from a well jointly owned by Petitioners and Atlantic. However, Atlantic, which had also collected rates in excess of 15 cents, was not required to make any refunds whatsoever.

On July 25, 1966, the Commission issued Opinion No. 499, stating that,

> "The Commission has both the power and the duty to order refunds where amounts in excess of the in-line price have been collected by a producer operating under a temporary certificate without specific refund conditions * * *"

The Commission also ruled that nothing set forth in the briefs of the parties required a hearing on the refund issue. It stated that Atlantic was spared a refund

obligation as a *quid pro quo* for the settlement of an investigation proceeding involving all of its jurisdictional sales that was then pending before the Commission. (No such investigation was pending as to Petitioners' sales.) On September 2, 1966, the Commission granted applications for rehearing of Opinion No. 499 and has taken no further action.

On May 24, 1967, the Fifth Circuit Court of Appeals upheld the Commission's Opinion No. 478 which set the in-line price of 15 cents per Mcf. for Petitioners. While the Commission's opinion No. 499 was not before it, the court of appeals also held that the Commission has the power to order refunds of amounts collected under unconditioned temporary certificates but that it must first explore and give due weight to "all equitable considerations involved." Regarding the power to order refunds, the court stated:

> "With deference to the Tenth Circuit, we disagree with the reasoning in *Sunray Mid-Continent* and the decisions following it insofar as those decisions reject the power of the FPC to order refunds, if it is made to appear that it is appropriate to do so, in whole or in part, after weighing all equitable considerations."

REASONS FOR GRANTING THE WRIT

Whether the Federal Power Commission has the authority to order refunds of amounts collected under a temporary certificate when the Commission issued the temporary certificate without imposing any conditions requiring refunds and without giving notice that refunds might be required is a question of substantial importance upon which the circuits are divided. Further, the holding of the court of appeals below does not conform with decisions of this Court and is predicated

upon an incorrect interpretation of the Natural Gas Act. Finally, the refund of amounts collected under unconditioned temporary certificates is not required in order adequately to protect consumers since any resulting reduction in the individual consumer's price would be minimal and there is no assurance that the full amount of any refund will actually reach the consumer.

1. The result reached by the court of appeals in this case is in acknowledged conflict with the holding of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co.* v. *FPC*, 370 F. 2d 181 (10th Cir. 1966), and several related cases.[5] The Tenth Circuit has taken the position that the Commission can order refunds only when a producer contractually undertakes to make them by accepting a temporary certificate containing an express refund condition. Several petitions for certiorari seeking review of the Tenth Circuit decisions are already pending before this Court, including one by the Solicitor General on behalf of the Federal Power Commission (Nnmbers 60, 61, 62, 80, 227 and 415, October Term, 1967).[6]

Petitioners respectfully urge this Court to consider this case along with the petitions requesting review of the Tenth Circuit decisions and to resolve this conflict

---

[5] *Pan American Petroleum Corp.* v. *FPC*, 376 F. 2d 161 (10th Cir. 1967); *Standard Oil Co. of Texas* v. *FPC*, 376 F. 2d 578 (10th Cir. 1967); *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (10th Cir. 1959).

[6] The Federal Power Commission and others seeking review of the Tenth Circuit decisions state that they conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Public Serv. Comm'n* v. *FPC*, 329 F. 2d 242 (D.C. Cir. 1964), certiorari denied *sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963 (1964). Petitioners herein do not dispute this contention.

so that this proceeding, which is now almost seven years in duration, can resume toward an orderly solution.

2. The decision of the court of appeals in this case does not conform with several decisions of this Court. This Court has repeatedly stated that the Commission has no power to make reparation orders and that its power to fix rates is prospective only. *United Gas Improvement Co.* v. *Callery Properties, Inc.* (*Callery*) 382 U.S. 223, 229 (1965); *Atlantic Refining Co.* v. *Public Serv. Comm'n,* 360 U.S. 378, 389 (1959); *FPC* v. *Hope Natural Gas Co.* 320 U.S. 591, 618 (1944). These holdings are consistent with holdings of the Court in respect to other statutes similar to the Natural Gas Act. Thus, in *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 469-470 (1959), this Court held that in the absence of a grant of a reparations power in the governing statute neither a court nor a regulatory authority has power to order refunds of excessive rates collected under the filed tariffs. See also, *Montana-Dakota Utilities Co.* v. *Northwestern Public Serv. Comm'n,* 341 U.S. 246 (1951).

3. The Commission, in its petition for certiorari to the Tenth Circuit in No. 60, October Term 1967, urges that the power to impose a refund condition is not sufficient protection for the consumer regarding gas sales that have already occurred or will occur under temporary certificates already issued. It points to the existence of 579 outstanding contracts in which this identical refund issue could arise. Petitioners respectfully refer to page 12 of the brief in opposition for Respondent, Lamar Hunt, in No. 60, which strongly indicates that there are potentially far fewer refunds than the government suggests. Moreover, the power to order refunds of amounts collected under un-

conditioned temporary certificates will not measurably enlarge the protection afforded the consumer by clearly established powers of the Commission.

The Commission lacks direct jurisdiction over the distributors through whom refunds to consumers must be funneled. There is no assurance that the individual consumers affected by the payment of the 18-cent price herein would receive all of any refunds required to be paid by Petitioners. Actually, in the past a substantial portion of refunds paid by pipe lines to distributors have been retained by the distributors to compensate for claimed increased costs. Indeed, the Commission has acknowledged that it has no direct authority to insure that the consumers receive the benefit of refunds, since ultimately this is within the jurisdiction of the various state commissions. *Skelly Oil Co.*, 35 F.P.C. 849, 854-55 (1966); *Humble Oil & Refining Co.*, 32 F.P.C. 49, 52-53 (1964).

Even more important than the question of whether the consumer ever receives refunds is the fact that the amount received by the producer for the sale of natural gas is but a small percentage of the cost to the consumer. Recent United States Government statistics show that only 14.9 per cent of the amount the average residential consumer pays for gas goes to the producer.[7] The amount of money involved in the

---

[7] The United States Bureau of Mines reports that in 1965 the average wellhead price for natural gas in the United States was 15.6 cents per thousand cubic feet and that the average price for residential use was 104.8 cents per thousand cubic feet. Thus, the wellhead price in 1965 was 14.9 per cent of the amount paid by the average residential consumer. It is possible, of course, that 1966 and 1967 prices would alter this average slightly, but the average has remained fairly constant since 1962. United States Bureau of Mines, *1965 Minerals Yearbook*, Natural Gas Chapter, Table 1, page 2 and Table 10, page 19.

potential refunds is obviously but a fraction of the total amount received by individual producers for their gas. Thus, the potential refund benefit for the average consumer is actually quite small.

Manifestly, the power to order refunds of amounts collected under unconditioned temporary certificates, where none is contained in the statute, is not required for the protection of consumers.

CONCLUSION

The petition for a writ of certiorari should be granted and the case consolidated for briefing and oral argument with Nos. 60, 61, 62, 80, 227 and 415, October Term 1967.

Respectfully submitted,

GEORGE B. MICKUM, III
JAMES L. MCHUGH, JR.
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorneys for Blanco Oil Co. and Killam & Hurd

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Of Counsel

LIBRARY
SUPREME COURT, U. S.

Nos. 604, 520, 526

In the Supreme Court of the United States

OCTOBER TERM, 1961

AUSPRAL OIL COMPANY INCORPORATED, BROOKLYN UNION GAS COMPANY, ET AL., ILLINOIS OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON MOTIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

ARLEN S. SPECTER,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

RICHARD A. SOLOMON,
General Counsel,
FREDERIC H. ROBERTS,
Solicitor,
JOHN TERRACHE,
Attorney,
Federal Power Commission,
Washington, D.C. 20426.

In the Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 504, 520, 526

AUSTRAL OIL COMPANY INCORPORATED, BROOKLYN UNION GAS COMPANY, ET AL., BLANCO OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Austral Pet. App. A, pp. 1a–41a; Brooklyn Pet. App. pp. 1a–41a) is reported at 378 F. 2d 510. The opinion and order of the Federal Power Commission (J.A. 436–463)[1]

[1] "J.A." refers to the joint appendix filed in C.A. 5, Nos. 23188, 23189, 23325, 23332, 23408, 23454 and 23455, all of which related to the Commission's order in *Turnbull & Zoch Drilling Co.*, 34 F.P.C. 1001. The petitions for review in these cases were consolidated by the court of appeals with petitions to review a second Commission order entered in a separate, but similar, in-line price proceeding, *Hassie Hunt Trust*, 30 F.P.C. 1438. A separate joint appendix was filed in the proceedings relating to the *Hunt* order. The instant petitions for certiorari relate exclusively to the Commission's order in *Turnbull & Zoch*.

is reported at 34 F.P.C. 1001, and its order denying rehearing (J.A. 483–488) is reported at 34 F.P.C. 1367.

JURISDICTION

The judgment of the court of appeals (Brooklyn Pet. App. 42a) was entered on May 24, 1967. The petitions for writs of certiorari were filed on August 16, 1967 (No. 504), August 21, 1967 (No. 520), and August 22, 1967 (No. 526). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATEMENT

The Commission granted certificates of public convenience and necessity authorizing sales of gas by numerous independent producers in Texas Railroad Commission District No. 4. The certificates were conditioned to require the producers to charge no more than a specified ("in-line") price.[2] The Commission deferred for later consideration the question whether and to what extent refunds should be required of those producers who had charged more than the in-line price pursuant to unconditioned temporary certificates.

The court of appeals affirmed the Commission's in-line price determinations, rejecting, *inter alia,* the

[2] The Commission made three separate in-line price determinations in this proceeding: (1) 15 cents per Mcf for sales antedating the issuance of the Commission's Statement of General Policy No. 61–1, 24 F.P.C. 818 (September 28, 1960), (2) 16 cents per Mcf for sales contracted subsequent thereto but prior to the amendment of the original guideline price established by the Policy Statement, and (3) 16 cents per Mcf for sales postdating the amendment.

argument of the consumer-distributor parties (petitioners in No. 520) that in fixing the 16-cent post-Policy Statement prices the Commission had erroneously relied upon contract prices, temporary certificate prices, and its Policy Statement "guideline" prices. In this respect, the court expressly followed the decision of the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission,* 370 F. 2d 181, pending on petitions for certiorari in Nos. 60, 61, 62, and 82, this Term, which also approved a 16-cent in-line determination for post-Policy Statement sales from Texas District No. 4. Conversely, it recognized that its reasoning was contrary to that of the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission,* 373 F. 2d 816, pending on petitions for certiorari in Nos. 111, 143, 144 and 231, this Term.

With respect to refunds, the court held that the question whether the Commission had the power to require refunds was ripe for review and that the Commission does have the power to require refunds under unconditioned temporaries. It expressed its disagreement with the Tenth Circuit's holding in *Sunray DX, supra,* and related cases [3] that the Commission lacked such refund power.

Finally, the Court rejected the consumer-distributors' contention that the certificate applications

[3] *Pan American Petroleum Corp.* v. *Federal Power Commission,* 376 F. 2d 161, pending on petitions for certiorari in Nos. 227, 415 and 516, this Term; *Standard Oil Co.* v. *Federal Power Commission,* 376 F. 2d 578, pending on petitions for certiorari in Nos. 80, 97, and 503, this Term.

should have been denied for lack of an adequate showing of public need for the gas involved. In so ruling, the Court stated its disagreement with the District of Columbia Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission, supra.*

DISCUSSION

The questions presented here are the same as those presented in a number of other pending petitions.[4] We have already expressed our view that the in-line and refund questions warrant review. See our petitions in Nos. 60, 80, 144 and 227. However, for the same reasons noted in our petition in No. 144 and in our memorandum in No. 231, this Court may wish to defer action on the present petitions (as well as on those challenging the *Public Service Commission* decision of the District of Columbia Circuit and the *Pan American* decision of the Tenth Circuit) until final dis-

[4] The refund question presented in Nos. 504 and 526 is the same question raised by our petitions in Nos. 60 (*Sunray DX*), 80 (*Standard Oil*), and 227 (*Pan American*), and by the petitions of other parties in Nos. 61 and 62 (*Sunray DX*), 97 and 503 (*Standard Oil*), and 415 (*Pan American*), all of which relate to the Tenth Circuit's recent decisions holding that the Commission lacks such power.

The in-line price question presented by the petition in No. 520 has previously been raised by the consumer-distributors' petitions in Nos. 61 and 62, this Term, which seek review of the Tenth Circuit's decision in the *Sunray DX* case, *supra*, and by our petition in No. 144 and the producer petitions in Nos. 111, 143 and 231, this Term, which seek review of the District of Columbia Circuit's decision in *Public Service Commission*, *supra.*

The public need question presented by No. 520 is also presented by Nos. 143 and 231.

position of Nos. 60–62, 80, 97 and 503, which relate to the Tenth Circuit's *Sunray* and *Standard Oil* decisions and which fully present the refund and in-line questions.

To be sure, the question of public need raised by petitioners in No. 520 is not involved in those cases. But, as urged in our memorandum in No. 231, review of that issue is not warranted since no real conflict exists between the decision below and the decision in the *Public Service Commission case, supra,* where the District of Columbia Circuit held that the Commission had not adequately considered the issue.

The court below expressed disagreement with the District of Columbia Circuit's decision on the public-need question (Austral Pet. App. A, pp. 26a–27a) on the assumption that that decision requires a burdensome evidentiary presentation on the need issue in every producer certificate case. Thus, the court below referred (*ibid.*) to a "proliferation of issues and evidence in § 7 [producer] proceedings" that, in its view, would necessarily result if the Commission should attempt to follow the decision of the District of Columbia Circuit. As we explained in our memorandum in No. 231, we do not believe that the District of Columbia Circuit's opinion can properly be read as imposing such rigid evidentiary or hearing requirements. In our view, it requires only a more detailed explanation of the result reached by the Commission in that case. Since the requirements imposed by the District of Columbia Circuit's decision—although in our opinion stemming from an erroneous view of the law—would not impose any significant

administrative burden on the Commission or affect the substantive rights of any party, there would appear to be no occasion for further review of that decision.

CONCLUSION

The petitions for writs of certiorari should be held to abide this Court's final disposition of the petitions in Nos. 60–62, 80, 97 and 503.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

PETER H. SCHIFF,
Solicitor,

JOEL YOHALEM,
Attorney,
Federal Power Commission.

SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 526

BLANCO OIL CO. and KILLAM & HURD, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION

GEORGE B. MICKUM, III
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorney for Blanco Oil Co. and Killam & Hurd

October 9, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 526

BLANCO OIL CO. and KILLAM & HURD, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONERS' REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION

The Federal Power Commission has suggested that the present petition should be held for this Court's final disposition of petitions in other similar cases arising from orders issued by the Court of Appeals for the Tenth Circuit. The Commission asserts that

this procedure would be proper because the Tenth Circuit cases fully present the refund issue raised by petitioners.

Petitioners agree that, as a general rule, where a petition raises the same issue involved in a pending case the Court should defer action on the petition until the pending case is decided and then dispose of the petition summarily in conformity with its decision. However, as the Commission admits, this procedure is sound only if the issues are in fact identical and if there are no other persuasive reasons for hearing both cases.

1. The present case is not identical to those arising in the Tenth Circuit. Both this petition and those from the Tenth Circuit raise the basic legal question of whether the Natural Gas Act empowers the Commission to order refunds of rates collected under the authority of unconditioned temporary certificates. However, because of two unique fact situations the present petition also raises other substantial issues that are not involved in the Tenth Circuit petitions.

First, in petitioners' acceptances of their temporary certificates they agreed to dedicate their gas to interstate commerce at the reduced rate demanded by the Commission only if it was agreed that no refund obligation would be imposed (J.A. 232-237). The Commission accepted this condition in writing and ordered it made part of petitioners' rate schedules. The Commission's unilateral abrogation of this agreement raises serious questions that are not presented by the Tenth Circuit cases.

Second, the Atlantic Refining Company, which had temporary authority to sell gas from the same field

and at the same price as petitioners (and in one instance from the same well), has been granted a permanent certificate without any refund obligation. Thus, the Commission has placed the petitioners, who are among the smallest producers in the field, at a considerable competitive disadvantage with regard to Atlantic, the largest producer in the field. This discrimination is hardly consistent with the Commission's announced intention of setting uniform in-line prices for each gas producing area.

Therefore, assuming arguendo that the Commission has the authority to order refunds in appropriate cases, the present petition raises serious questions of due process, equal protection and statutory interpretation with regard to the propriety of exercising that authority over petitions. These questions cannot be settled by the Tenth Circuit cases.

2. There is an additional persuasive reason why the present petition should not be held for summary disposition based upon the outcome of the Tenth Circuit cases. The failure to grant petitioners a hearing would further compound the fundamental unfairness incumbent in the fact that they have never been afforded an adequate hearing by either the Commission or the court of appeals.

The Commission summarily determined that petitioners were obliged to make refunds and effectively denied petitioners any opportunity to present evidence on the issue. The court of appeals undertook to rule on the refund issue even though petitioners and others urged that it was not before the court and made no presentation to that court on the refund issue. Under these circumstances it is respectfully urged that this

Court insure that petitioners receive an adequate hearing.

3. It is certainly not without precedent for this Court to hear argument simultaneously in several similar or related cases where the basic legal questions are identical but factual differences may require dissimilar results. Petitioners submit that this is just such a case. However, petitioners also realize that multiple proceedings impose a considerable burden upon the limited time of the Court. Therefore, if the Court feels that oral argument by petitioners would constitute such a burden, petitioners are willing to submit their arguments on briefs alone.

CONCLUSION

Petitioners renew their request that a writ of certiorari be granted and the case consolidated for briefing and oral argument with the similar petitions pending in the Tenth Circuit cases. Alternatively, petitioners urge that a writ of certiorari be granted for the purpose of allowing petitioners to submit their case to the Court on briefs alone.

Respectfully submitted,

GEORGE B. MICKUM, III
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorney for Blanco Oil Co. and Killam & Hurd